

SUPREME COURT OF CALIFORNIA

MEMORANDUM

Appendix of Appointed Counsel's Duties

Please note the following duties of appointed counsel, as set forth in the “timeliness standards” and “compensation standards” contained in Policy 3 of the “Supreme Court Policies Regarding Cases Arising From Judgments of Death,” last published in Advance Pamphlet No. 4 of the 2008 California Official Reports, at Rules pages 16-24. In addition, these and related materials are available on the judicial branch Web site, www.courtinfo.ca.gov/courts/supreme/dpenalty.htm, including any recent amendments (and in Deering's and West's California Rules of Court).

Appellate counsel in a capital case must take and maintain detailed, understandable, and computerized transcript notes, and must compile and maintain a detailed list of potentially meritorious habeas corpus issues that have come to appellate counsel's attention. Moreover, if appellate counsel's appointment does not include related habeas corpus/executive clemency representation, until separate postconviction habeas corpus/executive clemency counsel (“habeas corpus” counsel) is appointed, appellate counsel must preserve evidence that comes to his or her attention if that evidence appears relevant to a potential habeas corpus investigation. (Supreme Ct. Policies Regarding Cases Arising From Judgments of Death, policy 3, std. 1-1, 1st par.)

After separate habeas corpus counsel is appointed, appellate counsel must deliver to habeas corpus counsel copies of the list of potentially meritorious habeas corpus issues, copies of the transcript notes, and any preserved evidence relevant to a potential habeas corpus investigation, and thereafter must update the “issues list” and the computerized transcript notes as warranted. Moreover, appellate counsel must consult with and work cooperatively with habeas corpus counsel to facilitate a timely investigation, and the timely preparation and filing (if warranted) of a habeas corpus petition by appointed habeas corpus counsel. (Policy 3, std. 1-1, 1st par.)

Appointed appellate counsel's scope of representation includes the preparation and certification of the record on appeal; representation in the direct appeal before the California Supreme Court; preparation and filing of a petition for a writ of certiorari, or an answer thereto, in the United States Supreme Court, and, if certiorari is granted, preparation and filing of a brief or briefs on the merits, and

preparation and presentation of oral argument; and representation in the trial court relating to proceedings to set an execution date pursuant to Penal Code section 1193. (Policy 3, std. 2-1, 1st par.)

Appointed habeas corpus counsel's scope of representation includes the investigation, and preparation and filing (if warranted), of a habeas corpus petition in the Supreme Court, including any informal briefing and evidentiary hearing ordered by the court and any petition to exhaust state remedies; representation in the trial court relating to proceedings to set an execution date pursuant to Penal Code section 1227; and representation in executive clemency proceedings before the Governor of California. (Policy 3, std. 2-1, 2d par.)

As noted, habeas corpus counsel in a capital case has a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. The duty to investigate is limited to investigating potentially meritorious grounds for relief that come to counsel's attention in the course of reviewing appellate counsel's list of potentially meritorious habeas corpus issues, the transcript notes prepared by appellate counsel, the appellate record, trial counsel's existing case files, and the appellate briefs, and in the course of making reasonable efforts to discuss the case with the defendant, trial counsel, and appellate counsel. (Policy 3, std. 1-1, 2d par.)

Habeas corpus counsel's duty to investigate does not impose on such counsel an obligation to conduct, nor does it authorize the expenditure of public funds for, an unfocused investigation having as its object uncovering all possible factual bases for a collateral attack on the judgment of death. Instead, habeas corpus counsel has a duty to investigate potential habeas corpus claims only if counsel has become aware of information that might reasonably lead to actual facts supporting a potentially meritorious claim. (Policy 3, std. 1-1, 2d par.) A petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 180 days after the final due date for the filing of the appellant's reply brief on the direct appeal, or within 36 months after appointment of habeas corpus counsel, *whichever is later*. (Policy 3, stds. 1-1.1 & 1-1.2, as amended eff. Nov. 30, 2005; see also, *In re Robbins* (1998) 18 Cal.4th 770.)

In the event that more than one counsel is appointed to represent the same defendant jointly, either in a capital appeal, in related habeas corpus/executive clemency proceedings in the Supreme Court or in both classes of proceedings upon an "appellate/habeas corpus" appointment, one such attorney must be designated as lead counsel for each *separate* appointment. Lead counsel is responsible for the overall conduct of the case (i.e., the capital appeal, the related habeas corpus/executive clemency proceedings or, in appellate/habeas corpus

representation, both classes of proceedings) and for supervising the work of appointed associate counsel and any nonappointed, supervised counsel. (Cal. Rules of Court, rule 8.605(c)(2); see also, Advisory Com. com. to subd. (c).)

Appellate counsel and habeas corpus counsel also have a duty to cooperate, as a condition of the appointment, with the assisting entity or counsel designated by the Supreme Court to provide outside consultation and resource assistance to appointed counsel. Appointed counsel's cooperation and close working relationship with his or her assisting entity or counsel are important to achieving the common goal of maintaining a high level of legal representation in all capital appeals and related habeas corpus/executive clemency proceedings.

The Supreme Court requires the assisting entity or counsel to report to it periodically and in detail on appointed counsel's case progress. The court places considerable weight on these reports in determining compensation of counsel and whether counsel should be given additional capital case appointments.

Assisting entities that may be designated in this capacity include, as appropriate, the California Appellate Project (CAP) in San Francisco, the Office of the State Public Defender (OSPD), and the Habeas Corpus Resource Center (HCRC). (See Cal. Rules of Court, rule 8.605(c)(5).) In the event the designated assisting entity or counsel has a conflict of interest, the Supreme Court will designate an alternative assisting entity, or an experienced private capital appellate and/or habeas corpus practitioner, as appropriate.

Appointed counsel's obligation to cooperate with other appointed counsel and the assisting entity or counsel includes the following duties:

1. Appellate counsel must promptly make available to the assisting entity or counsel, for review, the above-described computerized transcript notes and detailed list of potentially meritorious habeas corpus issues, as well as a list of potential issues on the direct appeal.
2. Upon a request from the assisting entity or counsel, and after consultation with the Automatic Appeals Monitor, appellate counsel must either make a copy of relevant portions of the record available to that entity or counsel for its review, or permit the assisting entity or counsel to photocopy the record.
3. Both appellate and habeas corpus counsel must promptly initiate and maintain communication with the defendant/appellant, trial counsel, and any separately appointed counsel.

4. Both appellate and habeas corpus counsel must review carefully all manuals, newsletters, and other materials distributed by any assisting entity or counsel, and make appropriate use of the resources available in brief and information banks.

5. Unless the Supreme Court advises counsel otherwise, both appellate and habeas corpus counsel are expected to attend postappointment training programs presented by the assisting entities or counsel.

6. Habeas corpus counsel must submit to the assisting entity or counsel a detailed outline of potential habeas corpus issues to be investigated and a proposed investigation plan, and must conduct a prompt investigation, as described above, of any potentially meritorious habeas corpus issues.

7. Appellate counsel must maintain ongoing consultation with the assisting entity or counsel regarding possible appellate issues; drafts of motions, pleadings, and briefs; and oral argument and a moot court in preparation for oral argument.

8. Both appellate and habeas corpus counsel must consult with the assisting entity or counsel regarding the amount of time appointed counsel plans to spend researching the direct appeal and/or conducting a habeas corpus investigation. In so doing, appointed counsel must consult, and be guided by, the Supreme Court's (a) Policy 3 timeliness standards and compensation standards, referenced above, as well as the court's (b) "time and costs" payment guidelines and (c) "fixed fee" guidelines. The time-and-costs payment guidelines and fixed fee guidelines are last published in Advance Pamphlet No. 4 of the 2008 California Official Reports, at Rules pages 25-35, and 36-53, respectively. In addition, these and related materials are available on the judicial branch Web site, www.courtinfo.ca.gov/courts/supreme/dpenalty.htm, including any recent amendments (and in Deering's and West's California Rules of Court).

The court's Internal Operating Practices and Procedures are available on the judicial branch Web site, www.courtinfo.ca.gov/courts/supreme/iopp.htm, and in Advance Pamphlet No. 4 of the 2008 California Official Reports, at Rules pages 1-15 (and in West's California Rules of Court).

9. Both appellate and habeas corpus counsel must submit drafts of all motions, pleadings, briefs, petitions and replies, investigation plans, etc., to the assisting entity or counsel for review, allowing sufficient time for that review and for incorporating appropriate suggested changes into the final document.

10. Both appellate and habeas corpus counsel must provide the assisting entity or counsel with copies of all court orders, motions, pleadings, briefs, petitions, replies and responses, etc., filed by appointed counsel and by counsel for the respondent.

The Supreme Court anticipates that all appointed counsel will provide the foregoing level of cooperation with other appointed counsel and with the assisting entity or counsel. If appointed counsel, or the assisting entity or counsel, identifies problems that may impinge upon this cooperation, appointed counsel, or the assisting entity or counsel, should promptly notify the Automatic Appeals Monitor with regard to the difficulties encountered.

The court hopes that these procedures will assist your efforts, and it welcomes your comments and suggestions. Please address any questions, comments or suggestions to Automatic Appeals Monitor Robert Reichman, at (415) 865-7016.